HIGH COURT OF CHHATTISGARH AT BILASPUR

Arbitration Appeal No.9 of 2007

APPELLANT South Eastern Coalfield Ltd.

Versus

RESPONDENT Suresh Meerchandani

POST FOR ORDER ON 19th July, 2007

Sd/-
Dhirendra Mishra
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

Arbitration Appeal No.9 OF 2007

APPELLANT South Eastern Coalfields Ltd. Through Chairman cum Managing Director, South Eastern Coalfields Ltd., The General Manager, (Legal) Power of Attorney Holder for South Eastern Coalfields Limited Seepat Road Bilaspur.

Versus

RESPONDENT Suresh Meerchandani, 8 Ridge Road, Idgah Hills, Bhopa, Madhya Pradesh.

Present:

Dr. N.K. Shukla, Sr. Advocate with Miss Ritu Mishra, Advocate for the appellant.

Syed Imtiaz Ali, Advocate for respondent.

O R D E R

(Delivered on 19/07/2007)

Dhirendra Mishra, J

1) The appellant has preferred this appeal under Section 39 of The Arbitration Act, 1940 (hereinafter shall be referred as 'Act of 1940') against the order dated 14th November, 2006 passed by the District Judge, Bilaspur in M.J.C. No.59/05 whereby the application preferred by the appellant herein under Section 30 read with Section 33 of the Act of 1940 has been rejected with a finding that the arbitral proceedings commenced before the Arbitrator would be governed by the Arbitration & Conciliation Act, 1996 (hereinafter shall be referred as 'Act of 1996') and therefore, the application under Sections 30 read with Section 33 is not maintainable as also on the ground that even if the application is treated to be that of under Section 34 of the Act of 1996 in that case also no ground, as envisaged under sub-section (2) of Section 34

has been established for setting aside the award passed by the Arbitrator.

2) Brief facts of the case is that the respondent is a Civil Contractor, who was engaged by the appellant as Contractor vide work order dated 8.4.1986 issued by the Chief Engineer (Civil), Western Coalfields Limited, Nagpur for the construction of RCC overhead tank at Pali township of Sohagpur. A dispute arose between the parties and respondent invoked the arbitration clause of the agreement vide his letter dated 20.6.1994 and called upon the Chairman cum Managing Director (for short 'CMD') of the appellant herein to appoint Arbitrator as per arbitration agreement. Respondent, on failure of the CMD in appointing Arbitrator, moved an application under Section 20 of the Act of 1940 in the Court of 2nd Additional District Judge, Bilaspur. The said application was allowed and the dispute was referred to the Arbitrator to be appointed by the CMD, who Acting on the said reference vide his letter dated 28.6.1996 appointed Mr. J.P. Thakur, Chief Engineer (Civil), S.E.C.L. as the Sole Arbitrator for adjudication of the dispute. The appointed Arbitrator entered upon the reference and commenced the proceedings, however, subsequently, he tendered his resignation as an Arbitrator. In the meanwhile, the appointed Arbitrator had completed the substantial arbitration proceedings except making final award. On resignation of Shri Thakur, the CMD appointed Shri T. Prasad, the then Executive Director (S&R) as Arbitrator in place of Shri Thakur. Shri Prasad passed the final award on 10.5.2006 and allowed the claim of the respondent to the tune of Rs.2,41,647/-.

W7

3) An application under Section 30 r/w Section 33 of the Act of 1940 against the above award was rejected by the learned District Judge on the grounds mentioned herein above.

4) The only ground urged by learned Sr. Advocate for the appellant is that the finding of learned District Judge that arbitration proceedings would be governed by the Act of 1996 is contrary to law and against the stipulation of agreement. It was contended that the application was made under Section 20 of the Act of 1940, as agreement provided for application of the Act of 1940 for the purposes of the agreement. The fact that reference was made after coming into force of the Act of 1996 will not make any difference, as appointment of Arbitrator was made on the application preferred by the respondent under Section 20 of the Act of 1940. It was further contended that the award was not made within the period of four months from the date of reference and thus the Arbitrator became functus officio and the award made by him thereafter is non-est and void ab-initio. Reliance is placed on the judgment of Hon'ble Apex Court in the matter of **Thyssen Stahlunioin GMBH Versus Steel Authority of India Ltd.** reported in **(1999) 9 Supreme Court Cases 334.**

5) Though other grounds were also taken by the appellant in the memo of appeal, however, learned Sr. Advocate submitted that except the grounds referred in the previous paragraph, no other grounds were pressed by the appellant before the District Judge and therefore, he is not pressing other grounds for the purpose of instant appeal also.

6) On the other hand, learned counsel for the respondent submitted that the CMD of the appellant had appointed Mr. T. Prasad as Sole Arbitrator and directed him to conduct the arbitration proceedings in accordance with the provisions of

Act of 1996. The dispute was referred for appointment of Arbitrator by the learned Additional District Judge after coming into force of the Act of 1996. Even after the reference to the Sole Arbitrator Shri T. Prasad, the appellant participated in the arbitration proceedings without any objection and therefore, the appellant was estopped from making an application under Section 30 r/w Section 33 of the Act of 1940 claiming that the arbitration proceedings were in fact conducted under the Act of 1996. Respondent has also placed reliance on the judgment of Thyssen Stahlunion GMBH (supra) as also judgment in the matter of **The Secretary to the Govt. of Orissa and another Vs. Sarbeswar Rout** reported in **AIR 1989 SUPREME COURT 2259** and it was contended that in arbitration proceeding as soon as the Arbitrator indicates his willingness to act as such, the proceedings must be held to have commenced.

7) I have heard learned counsel for the respective parties and perused the impugned award.

8) It is not in dispute that on an application preferred by the respondent under Section 20 of the Act of 1940 learned Additional District Judge referred the dispute to the Sole Arbitrator to be appointed by the CMD of the appellant after coming into force of the Act of 1996. It is also not in dispute that the CMD of the appellant vide his letter dated 8.6.2002 appointed Shri T. Prasad as Sole Arbitrator and in the said communication it has been clearly mentioned that the arbitration proceeding is to be held in accordance with the provisions of the Act of 1996 and thereafter the parties to the arbitration agreement have participated before the Sole Arbitrator without any objection and ultimately award was passed on 10.5.2003.

9) In the matter of Thyssen Stahlunion GMBH (supra) in Para 22 it has been clearly held that the provisions of the old Act shall apply in relation to the arbitral proceedings which have commenced before coming into force of the new Act. It has also been held that new Act would be applicable in relation to the arbitral proceedings which commenced on or after the new Act came into force and it is open to the parties, even where the arbitration proceeding is pending before the Arbitrator before commencement of the new Act, to agree that the new Act be made applicable to such arbitral proceeding.

10) In the matter of the Secretary, Government of Orissa (supra) also it has been held that the commencement of arbitral proceeding takes place when the arbitrator indicates his willingness to act as such.

11) As already pointed out that the proceeding before the Arbitrator commenced only after coming into force of the Act of 1996. Even otherwise the finding of the learned District Judge that the award passed by the Arbitrator does not became void and in-operative only because the same was passed after the expiry of the term and the period may be subsequently extended by the Court is based on the established principles of law.

12) In the result, the appeal preferred by the appellant is devoid of merit, the same deserves to be dismissed and it is hereby dismissed in limine.

Sd/-
Dhirendra Mishra
Judge

Roshan/-